TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Other Authorities

No. 90-1014

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

ROBERT E. LEE, *et al.*,

Petitioners,

-v.-

DANIEL WEISMAN, *etc.*,

Respondent.

ON WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF

STATEMENT OF THE CASE

Respondent Daniel Weisman, whose daughter Deborah attends a public school in the City of Providence, Rhode Island, initiated this action in June 1989, in order to prevent the inclusion of prayer in Deborah's eighth grade promotional ceremony from the Nathan Bishop Middle School. The district court allowed the ceremony to proceed as scheduled.[1] The parties then

[1] Daniel Weisman filed his initial complaint four days before the (continued...)

submitted the case to the district court upon an Agreed Statement of Facts, which is summarized below.

At the close of each school year, the Members of the Providence School Committee and the Superintendent of Schools sponsor a promotional ceremony in each of the City's public middle schools and a graduation ceremony in each of the City's public high schools. (J.A.12, ¶11).[2] Eighth grade promotional ceremonies for the public middle schools are routinely conducted on school premises; high school graduation ceremonies are generally conducted in auditoriums which petitioners rent for the occasion. (J.A.13-16, ¶¶19-29; J.A.17, ¶34). Petitioners supervise and authorize the content of the public school promotional and graduation ceremonies. (J.A.12, ¶12). Their practice has been to allow the principal of each middle school and each high school to include, in the school's ceremony, an invocation and benediction in the form of prayer, delivered by clergy who are selected by school department employees. (J.A.12, ¶13; J.A.18, ¶40).

In June 1989, when respondent initiated this action, his daughter Deborah was an eighth grade student in the Nathan Bishop Middle School, a public school in the City of Providence. (J.A.10, ¶3). Teachers at the Nathan Bishop Middle School had planned a promotional ceremony for eighth grade students and had suggested

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[1] (...continued)
Nathan Bishop Middle School's promotional ceremony was scheduled to be held. The district court judge denied his Motion for a Temporary Restraining Order on the ground that the court did not have sufficient time, prior to the scheduled ceremony, to adequately address the issues presented. Deborah Weisman now attends Classical High School, a public high school in the City of Providence whose graduation ceremonies generally include prayer. (J.A.10, ¶3; J.A.13-14, ¶20).

[2] References to the joint appendix are preceded by the letters "J.A." The decisions below, which were included in the appendix to the petition for *certiorari*, are cited at "App.A" or "App.B."

to the principal, petitioner Robert E. Lee, that Rabbi Leslie Gutterman be asked to deliver an invocation and benediction at the ceremony. (J.A.12-13, ¶16). Petitioner Lee conveyed the invitation to Rabbi Gutterman, who accepted. (J.A.17, ¶36).

Prior to the actual ceremony, petitioner Lee provided to Rabbi Gutterman a pamphlet entitled "Guidelines for Civic Occasions," published by the National Conference of Christians and Jews. (J.A.13, ¶17). This pamphlet specifies the type of "public prayer" which should be composed for civic occasions. (J.A.20-21). Petitioners had distributed this pamphlet to all of the principals of Providence's middle schools and high schools as a guideline for the type of prayer to be included in the promotional and graduation ceremonies conducted in Providence's public schools. (J.A.12, ¶¶14-15). Petitioner Lee also instructed Rabbi Gutterman personally that the prayers he delivered at Nathan Bishop's promotional ceremony should be nonsectarian. (J.A.13, ¶17).

The parties agree that the invocation and benediction delivered by Rabbi Gutterman are prayers. (J.A.17, ¶36). For his invocation, Rabbi Gutterman prayed, as follows:

> God of the Free, Hope of the Brave:
>
> For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.
>
> For the liberty of America, we thank You. May these new graduates grow up to guard it.
>
> For the political process of America in which all its citizens may participate, for its court system where all can seek justice we

thank You. May those we honor this morning always turn to it in trust.

For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

AMEN

(J.A.22). For his benediction, Rabbi Gutterman offered the following prayer:

O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.

Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.

The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.

We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.

AMEN

(J.A.23).

From 1985 through 1989, many, but not all, graduation ceremonies conducted by the City of Providence's

public high schools included invocations and benedictions in the form of prayer, delivered by clergy.[3] (J.A.13, ¶18). In each case in which prayers were included, the respective high school produced and distributed a program that identified the name and institutional affiliation of the clergy who delivered the prayers. (J.A.13-14, ¶¶19-22). During the same time period, Providence's six public middle schools conducted annual promotional ceremonies for eighth grade students. All of these ceremonies took place on the premises of the respective school. (J.A.15-16, ¶¶23-29). Two of the six public middle schools included invocations and benedictions in the form of prayer in their ceremonies; the remaining four schools did not include prayer in their promotional ceremonies. Like the high schools, each middle school produced programs that identified the clergy delivering the invocation and benediction. (J.A.15, ¶¶23-24). Parents and friends of students are invited to attend Providence public schools' promotional and/or graduation ceremonies. (J.A.18, ¶42). Attendance at the ceremony is not mandatory for students. (J.A.18, ¶41).

In holding that the practice of including prayer in public school graduation and promotional ceremonies violates the Establishment Clause of the United States Constitution, the district court noted:

"The [Supreme] Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aquillard* [sic], 482 U.S. 578, 583-84 (1987) . . . .

This vigilance is based upon the perceived sensitive nature of the school environment

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[3] Of five public high schools located in the City of Providence, only one high school never included prayer in its graduation ceremonies during the five year period reviewed in the record. (J.A.16, ¶29).

> and the apprehended effect of State-led religious activity on young, impressionable minds.

App.B at 21a-22a (citation omitted).

Relying on established precedent, the district court analyzed the facts before it under the three-pronged test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Specifically, the district court held that "the benediction and invocation advance religion by creating an identification of school with a deity, and therefore religion." App. B at 24a (footnote omitted). This prohibited effect was heightened, according to the district court, by the fact that the challenged prayers were offered at graduation ceremonies. "It is the union of prayer, school, and important occasion that creates an identification of religion with a school function. The special nature of the graduation ceremonies underscores the identification that Providence public school students can make." App. B at 24a. The court then evaluated whether or not the identification of school with religion conveyed a message endorsing a particular religion or religion in general. After reviewing the facts in the record, the court concluded that petitioners' practice did convey such a message. App.B at 25a.[4]

Petitioners argued before the district court that the constitutionality of their policy concerning prayer at middle school promotional ceremonies and at high school graduation ceremonies should be analyzed under *Marsh v. Chambers*, 463 U.S. 783 (1983). The court rejected *Marsh* as inapplicable to prayer in a public school setting. App.B at 27a. Furthermore, the district court held "[e]xtending the *Marsh* analysis to school benedictions is

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[4] Because the court found that the challenged practice has the effect of advancing and endorsing religior., its analysis does not address issues of purpose and entanglement. App.B at 23a.

arguably unworkable because it results in courts reviewing the content of prayers to judicially approve what are acceptable invocations to a deity . . . . What must follow is a gradual judicial development of what is acceptable public prayer." *Id.* (citations omitted).

The United States Court of Appeals for the First Circuit affirmed the district court's decision, with Judge Campbell dissenting. App.A at 1a-17a. The majority opinion simply adopted the reasoning of the lower court; however, Judge Bownes' concurring opinion elaborated on the purpose and entanglement prongs of the *Lemon* test, which were not addressed by the district court. App.A at 2a, 9a-11a. Judge Bownes found that the primary purpose of prayer at a graduation ceremony is religious and that "a prayer given by a religious person chosen by public school teachers communicates a message of government endorsement of religion." App.A at 9a-10a. Judge Bownes also found that the specific facts of this case raise entanglement concerns for two reasons. First, school teachers choose speakers among various religious groups. Second, school officials engage in the supervision and regulation of the content of the prayers offered by clergy. App.A at 10a.

Judge Campbell's dissenting opinion tacitly concedes that petitioners' practice is unconstitutional under existing precedent. Consequently, he is forced to articulate a new rule that would provide for the allowance of invocations and benedictions at ceremonial occasions, provided that speakers are rotated among "representatives of the Judeo-Christian religion[] . . . representatives of other religions and of nonreligious ethical philosophies . . . ." App.A at 16a. As Judge Campbell himself recognizes, however, "[i]t may be . . . that even more needs to be done, to insure not only that the state does not identify itself with a particular religion but with religion generally." *Id.*

SUMMARY OF ARGUMENT

The issue in this case is whether public school officials violate the Establishment Clause when they include prayer as an integral part of promotional or graduation ceremonies, choose the clergy who appear at each ceremony, and monitor the content of prayers that are delivered to the assembled students. The court below found that such practices cannot be sustained under any interpretation of the Establishment Clause ever adopted by this Court. That decision is correct and should be affirmed.

Petitioners do not seriously quarrel with the decision below. Instead, they have seized upon this case as a vehicle to ask the Court to overturn more than four decades of well-settled law and rule, for the first time, that there can be no "establishment" of religion in the absence of coercion. It is an old and discredited argument that has been rejected by this Court on numerous occasions including, most recently, only two years ago. *See County of Allegheny v. ACLU*, 492 U.S. 573 (1989). If it is even reached in this case (since it was not raised below), it can and should be rejected again.

Because petitioners' attack is focused more on this Court's Establishment Clause jurisprudence than the decision below, their brief continuously refers to practices that are not at issue in this case, such as Thanksgiving Day proclamations. In so doing, petitioners distort the issues before this Court and ignore the Court's historic awareness of "the sensitive relationship between government and religion and the education of our children." *Grand Rapids School District v. Ball*, 473 U.S. 373, 383 (1985).

By focusing exclusively on the *Lemon* test, petitioners also ignore this Court's explicit recognition that *Lemon* did not create a new test but merely distilled the principles articulated in previous decisions. Before and

after *Lemon*, this Court has consistently stressed that the Establishment Clause requires government neutrality toward religion in order to preserve the integrity of both. *See, e.g., Abington v. Schempp*, 374 U.S. 203, 226 (1963). It is that principle, not just *Lemon*, that petitioners have violated.

This is not a case where the religious significance of the challenged practice is questionable or marginal. Petitioners have stipulated that this is a case about prayer, and this Court has consistently described prayer as an inherently religious activity. By incorporating prayer into a major public school ceremony, petitioners have violated every prong of the *Lemon* test. The unavoidable message delivered to the school children is that school officials support and encourage participation in a religious exercise. Efforts to dilute that message by reviewing the prayer before it is delivered only entangle school officials with religious practices that should remain the domain of the clergy.

Citing *Marsh v. Chambers*, 463 U.S. 783, petitioners contend that the use of prayer at public school promotional and graduation ceremonies is consistent with other historical practices of the framers and, therefore, must be consistent with the Establishment Clause. Confronted with similar arguments in the past, this Court has noted that "a historical approach is not useful in determining the proper roles of church and state in public schools . . . ." *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987). Moreover, *Marsh* itself carefully distinguished between religious practices aimed at adults and those directed at children who are more susceptible to "religious indoctrination." 463 U.S. at 792.

Petitioners' use of history to support their proposed coercion test is equally flawed. It is true that the founding generation opposed the coercion of religious beliefs. However, it is also true that the founding generation opposed the noncoercive endorsement of religion, and re-

pealed a variety of provisions providing for such endorsement during the very years that the Constitution was being debated and adopted. Respecting that history, this Court has squarely and repeatedly rejected any claim that coercion is a necessary element of the Establishment Clause. *See, e.g., Engel v. Vitale*, 370 U.S. 421, 431 (1962); *Abington v. Schempp*, 374 U.S. at 224-25; *Committee for Public Education v. Nyquist*, 413 U.S. 756, 786 (1973).

Finally, petitioners' definition of coercion disregards the subtle pressures that the Court has always recognized as coercive, especially in the school setting. Indeed, no member of this Court has ever adopted the limited definition of coercion that petitioners now embrace. The pressure upon public school children to conform to their classmates' behavior and their teachers' expectations and instructions does not vanish when the classroom door closes and the graduation march begins. Petitioners' unwillingness to recognize that fact highlights the unsuitability of their proposed coercion test.

ARGUMENT

I. PETITIONERS' PRACTICE OF INVITING CLERGY TO OFFER PRAYERS AT THE PROMOTIONAL AND GRADUATION CEREMONIES HELD BY PUBLIC MIDDLE SCHOOLS AND HIGH SCHOOLS VIOLATES THE ESTABLISHMENT CLAUSE UNDER ANY CRITERIA EVER ADOPTED BY THIS COURT

A. Any Analysis Of The Constitutionality Of Petitioners' Practice Of Including Prayer In Public School Promotional And Graduation Ceremonies Must Begin With Recognition Of The Special Nature Of The Public School Setting

Petitioners' global analogies which liken prayer in public school promotional and graduation ceremonies to prayer during presidential inaugurations, congressional sessions, and proclamations of National Days of Thanksgiving, are a thinly disguised attempt to escape the essential nature of this case. Unlike petitioners' analogies, this case is about the constitutionality of prayer in a public school setting. That distinction is crucial, moreover. This Court has consistently recognized that the introduction of religion into the public schools raises special and severe problems under the Establishment Clause. Thus, while acknowledging the value of prayer "'based on our spiritual heritage,'" *Engel v. Vitale*, 370 U.S. at 425 (citation omitted), and posting of the Ten Commandments "'as the fundamental legal code of Western Civilization and the Common Law of the United States,'" *Stone v. Graham*, 449 U.S. 39, 41 (1980) (citations omitted), this Court has never hesitated to strike down such practices when undertaken as part of public education.

Because of this Court's enhanced sensitivity towards Establishment Clause violations within the public

schools, a constitutional analysis of prayer at public school functions is intrinsically distinct and segregable from considerations applicable to other public arenas. Justice Frankfurter eloquently traced the roots of this special concern in a concurring opinion in *Ill. ex rel. McCollum v. Board of Education*, 333 U.S. 203, 212 (1948), in which he took note of the fierce struggles for state support among conflicting denominations that led to a burgeoning public school system, removed from the divisiveness of competing religious groups:

> Zealous watchfulness against fusion of secular and religious activities by Government itself, through any of its instruments but especially through its educational agencies, was the democratic response of the American community to the particular needs of a young and growing nation, unique in the composition of its people . . . . The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects.

Id. at 215-17 (footnote omitted).

The importance of maintaining strict neutrality toward religion within the public education system is a thread that weaves together all modern Establishment Clause decisions of this Court addressing the juxtaposition of religion and public schools. Since this Court first

began to grapple with the meaning and intent of the Establishment Clause, it has decreed both advocacy for religion and hostility towards religion out of bounds within this nation's public schools. In his lengthy concurrence in *Abington v. Schempp*, 374 U.S. 203, Justice Brennan summarized the Court's views on religion in the public schools:

> [T]he American experiment in free public education available to all children has been guided in large measure by the dramatic evolution of the religious diversity among the population which our public schools serve. The interaction of these two important forces in our national life has placed in bold relief certain positive values in the consistent application to public institutions generally, and public schools particularly, of the constitutional decree against official involvements of religion which might produce the evils the Framers meant the Establishment Clause to forestall . . . . It is implicit in the history and character of American public education that the public schools serve a uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort -- an atmosphere in which children may assimilate a heritage common to all American groups and religions . . . . [T]his is a heritage neither theistic nor atheistic, but simply civic and patriotic.

Id. at 241-42 (citations omitted)(emphasis in original).

Like Justice Frankfurter, Justice Brennan recognized the unique role filled by public education in a country that, over time, has become extraordinarily diverse in the

religious beliefs of its citizens.[5] In *Epperson v. Arkansas*, 393 U.S. 97, 104-05 (1968), the Court reaffirmed its special concern for religious practices in the public schools, citing with approval *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)("'[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools'"), and *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)("[T]he First Amendment 'does not tolerate laws that cast a pall of orthodoxy over the classroom'").

Recent decisions of this Court continue to recognize the special role of the public education system in our society, coupled with the understanding that public school children are more susceptible than adults to religious messages. Rejecting a comparison between presidential proclamations celebrating Thanksgiving and a period of silence for the purpose of prayer in the public schools, Justice O'Connor has observed:

> At the very least, Presidential Proclamations are distinguishable from school prayer in that they are received in a non-coercive setting and are primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination. This Court's decisions have recognized a distinction when government-sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs.

Wallace v. Jaffree, 472 U.S. 38, 81 (1985)(O'Connor, J., concurring)(citations omitted). *See also Grand Rapids*

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[5] In *Edwards v. Aguillard*, 482 U.S. at 607 n.6, Justice Powell in his concurrence noted that "*The Encyclopedia of American Religions* (2d ed. 1987) describes 1,347 religious organizations."

School District v. Ball, 473 U.S. at 383 ("We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children. The government's activities in this area can have a magnified impact on impressionable young minds . . . ."); *Edwards v. Aguillard*, 482 U.S. at 583-84 ("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools . . . . The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure")(footnote omitted)(citation omitted).[6]

Petitioners choose to ignore the consistent recognition by this Court, spanning more than forty years, that the public education system in this country fills a unique and vital role in the lives of our children and in the con-

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[6] This Court reaffirmed, just one year ago, its deep concern with the intermingling of public school officials, religion, and school children. *Board of Education v. Mergens*, ___ U.S. ___, 110 S.Ct. 2356 (1990). Applying the *Lemon* test to an Establishment Clause challenge to the Equal Access Act, the *Mergens* Court carefully reviewed the limitations imposed by the Act on any involvement of school officials in voluntary, student-organized and student-led groups. Because the Act on its face prohibited the school from sponsoring religious groups or their meetings, limited school official involvement to custodial, "non-participatory" attendance, and forbade any state influence of any religious activity, the Court's plurality held that the purpose of the Act was to "prevent discrimination against religious and other types of speech," and that no message of school endorsement was conveyed by the mere allowance of a wide variety of student-initiated and student-led clubs. *Id.* at 2370-73. The basic thesis underlying the Court's analysis in *Mergens* was the creation of a limited public forum for student groups. The facts in this case are not remotely comparable -- here, public school teachers chose a member of the clergy to deliver prayers at an event run by and organized by public school officials. Those same officials directed the clergy they chose regarding the content of the prayers he or she was to deliver.

tinued vitality of constitutional principles upon which this country is founded. This case is not about presidential proclamations, inaugural ceremonies, or the opening of legislative or judicial sessions. Rather, this case is about prayer in a public school sponsored event, delivered by a member of the clergy chosen by a public school official, and both planned and supervised by school officials as the culmination of a child's progress through the public school system. To suggest that the special vigilance which this Court has long accorded in evaluating religious practices within the public schools is inapplicable here is to blink at reality. Promotional and graduation ceremonies are as integral to a child's school career as is daily class attendance.[7] Any analysis of a school policy pertaining to these ceremonies which implicates Establishment Clause concerns must begin with the heightened vigilance accorded to religious practices in the public schools.

B. The *Lemon* Test Reflects The Concept That The Establishment Clause Mandates Neutrality And Autonomy Between Public Schools And Religion

For the past twenty years, this Court and the lower courts have consistently relied on the so-called *Lemon* test in evaluating Establishment Clause claims. As Justice Powell has observed, *Lemon* "identifies standards that have proved useful in analyzing case after case both in our decisions and in those of other courts. It is the only coherent test a majority of the Court has ever adopted." *Wallace v. Jaffree*, 472 U.S. at 63 (Powell, J., concurring).

Petitioners' singleminded focus on *Lemon*, however, disregards the fact that *Lemon* itself is merely a distillation of this Court's other Establishment Clause holdings. Indeed, *Lemon*'s formulation of secular purpose and effect flows directly from *Schempp*'s explanation of "wholesome neutrality." 374 U.S. at 222. Thus, in asking the Court to reconsider *Lemon*, petitioners are effectively asking the Court to reconsider its entire Establishment Clause jurisprudence covering nearly half a century. *See, e.g., Everson v. Board of Education*, 330 U.S. 1, 18 (1947) ("[The First] Amendment requires the State to be a neutral in its relations with groups of religious believers and non-believers . . . ."); *Zorach v. Clausen*, 343 U.S. 306, 314 (1952)("The government must be neutral when it comes to competition between sects"); *Abington v. Schempp*, 374 U.S. at 226 ("In the relationship between man and religion, the State is firmly committed to a position of neutrality"); *Epperson v. Arkansas*, 393 U.S. at 103-104 ("Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice"); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 741 (1976) ("Neutrality is what is required"); *Wallace v. Jaffree*, 472 U.S. at 60 ("[G]overnment must pursue a course of complete neutrality toward religion").

To discard the concepts embodied in *Lemon* and expounded upon in numerous decisions by this Court is to invite havoc in both the lower courts and in the administration of the public schools. To discard *Lemon* is to discard the rationale of *Schempp*, and all of this Court's decisions that teach that prayer cannot be incorporated into the public schools. To discard *Lemon* is to solicit renewed litigation of all of the practices which this Court has already determined impermissibly mix religion and public education.[8]

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[7] Indeed, as the district court aptly observed, "The special nature of the graduation ceremonies underscores the identification that Providence public school students can make." App.B at 24a.

[8] Indeed, the National School Boards Association ("NSBA") has filed a (continued...)

The basic concepts enunciated in the *Lemon* test were not newly devised in *Lemon*, but developed gradually, founded on the premise that the Establishment Clause requires government to maintain neutrality towards competing religious sects and towards religion generally. "'The government is neutral, and, while protecting all, it prefers none, and it *discharges* none.'" *Abington v. Schempp*, 374 U.S. at 215 (emphasis in original), citing with approval *Minor v. Board of Education in Cincinnati* (Super.Ct. Cincinnati, Ohio, 1870)(Taft, J., dissenting). Government, in short, is prohibited both from inhibiting the free exercise of religion and from allowing "a majority" to use "the machinery of the State to practice its beliefs." *Abington v. Schempp*, 374 U.S. at 226.

In discussing the genesis of the Establishment Clause, this Court observed in 1947, long before *Lemon*, that,

> [t]he people [in Virginia], as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or *otherwise to assist* any or all religions . . . .

Everson v. Board of Education, 330 U.S. at 11 (emphasis added). The Court employed similar language in holding, during the following year, that religious instruction within the public schools, taught by private religious groups, violates the Establishment Clause:

> This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment . . . .

Ill. ex rel. McCollum v. Board of Education, 333 U.S. at 210.

The next Establishment Clause case decided by this Court and related to practices within the public schools was *Zorach v. Clausen*, 343 U.S. 306. While the Court in *Zorach* did not refer to government actions "supporting," "aiding" or "assisting" religion, it employed other terms equally familiar in modern Establishment Clause jurisprudence. Thus, the Court held, the First Amendment "studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other [i.e. church on state, or vice versa]." *Id.* at 312. In particular, "[g]overnment may not finance religious groups nor undertake religious instruction *nor blend secular and sectarian education* . . . ." *Id.* at 314 (emphasis added).

Three decades ago, in *McGowan v. Maryland*, 366 U.S. 420, 449 (1961), the Court employed the terms "purpose and effect" in its analysis of the constitutionality of Sunday closing laws:

> After engaging in the close scrutiny demanded of us when First Amendment liberties

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[8] (...continued)
brief *amicus curiae* in this case which, although nominally in support of petitioners, is actually an argument in support of the continued "viability of the *Lemon* test." NSBA Brief at 3. The Association's brief takes no position on the merits of this case; however, it vividly describes the chaos which would result were the Court to discard *Lemon*:

> However difficult the *Lemon* test may sometimes be to apply, it has been the test for 20 years and school people, students and parents have relied on it. If the Court in this case develops a "new test," assuredly that action will send out a message to schools, students, parents and communities throughout this country that all of the religion in the schools' cases are no longer "good law" or at least are questionable.

NSBA Brief at 20.

> are at issue, we accept the State Supreme Court's determination that the statute's present purpose and effect is not to aid religion but to set aside a day of rest and recreation.

These terms began to be referred to as the Establishment Clause "test" several years later, when the Court considered the constitutionality of daily recitation of the Bible and Lord's Prayer in public school classrooms:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

Abington v. Schempp, 374 U.S. at 222 (citations omitted), cited with approval in *Epperson v. Arkansas*, 393 U.S. at 107.

In *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970), this Court began to further develop the concepts of "purpose" and "effect" as they pertain to Establishment Clause issues:

> Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result -- the effect -- is not an excessive government entanglement with religion.

Id. at 674.

The Court relied on its analysis in *Schempp* and *Walz* when it devised the now familiar *Lemon* test:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."

Lemon v. Kurtzman, 403 U.S. at 612-13 (citations omitted).

In sum, *Lemon* simply coalesced concepts which the Court had been applying in Establishment Clause cases for over twenty years. Indeed, the Court itself has recognized this to be true:

> [T]hese tests or criteria should be "viewed as guidelines" within which to consider "the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause."

Committee for Public Education v. Nyquist, 413 U.S. at 773 n.31, *quoting Tilton v. Richardson*, 403 U.S. 672, 677-78 (1971). *See also Meek v. Pittenger*, 421 U.S. 349, 358 (1975)("These tests constitute a convenient, accurate distillation of this Court's efforts over the past decades . . . ."). Since *Lemon*, its familiar three-prong test has been accepted by this Court as a logical and comprehensible starting point for constitutional analysis in Establishment Clause cases.[9]

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[9] The one exception, of course, is this Court's decision in *Marsh v. Chambers*, 463 U.S. at 791, in which the Court adopted a historical analysis, centered upon the "unique history" of legislative chaplains. The *Marsh* Court was squarely presented with a practice identical to one authorized and adopted by the Congress which drafted the First Amendment. The *Marsh* rationale, however, does not "fit" the facts (continued...)

While consistently reaffirming the *Lemon* framework as a viable means of analyzing Establishment Clause issues, this Court recently clarified and refined its meaning and substance. In her concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984), Justice O'Connor restated the heart of the *Lemon* test:

> The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

The "purpose" and "effect" prongs of the *Lemon* test are thus addressed by an evaluation of both the objective and subjective "components of the message" conveyed by the challenged government action. A secular purpose which is a mere sham is not enough to save a challenged practice from constitutional infirmity. *See Stone v. Graham*, 449 U.S. 39. Rather, it is the actual intent of the government which is critical under the "purpose"

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[9] (...continued)
before the Court here. As the Court has previously noted in *Edwards v. Aguillard*, 482 U.S. at 583 n.4, such an approach "is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted" (citations omitted). *See also Wallace v. Jaffree*, 472 U.S. at 80 (O'Connor, J., concurring)(noting that since free public education was "virtually nonexistent" when the framers adopted the First Amendment "it is unlikely that [they] anticipated the problems of interaction of church and state in the public schools"). Indeed, the natural evolution of our culture, together with astounding technological progress, guarantee that innumerable practices not even imagined by the framers may collide with constitutional principles. It is the everyday work of the Court to apply constitutional principles to facts and circumstances beyond the ken of the framers.

prong. This approach was endorsed by six Justices of the Court in *Wallace v. Jaffree*, 472 U.S. at 56, and by seven Justices in *Grand Rapids School District v. Ball*, 473 U.S. at 389 (noting further that if a symbolic "link" or "identification" of government with religion conveys a message of endorsement, the Establishment Clause is violated). *See also Edwards v. Aguillard*, 482 U.S. at 583 n.4.

Most recently, in *County of Allegheny v. ACLU*, 492 U.S. at 600-01, this Court has explained the reach of the term "endorsement" as follows:

> [T]he very concept of "endorsement" conveys the sense of promoting someone else's message. Thus, by prohibiting government endorsement of religion, the Establishment Clause prohibits . . . the government's lending its support to the communication of a religious organization's religious message.

Petitioners propose no less than a total reconstruction of modern Establishment Clause jurisprudence, developed painstakingly and carefully by this Court over the past four decades. They propose the abandonment of the very cornerstone of what the Establishment Clause is understood to mean. In the process, they disregard the notion of *stare decisis*, which this Court described only a few weeks ago as "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, ___ U.S. ___, 59 U.S.L.W. 4814, 4819 (June 27, 1991).

It is true that *Payne* precipitated a debate among the members of the Court over the scope and meaning of *stare decisis* in constitutional cases. Yet, every member of the *Payne* Court agreed that allegiance to *stare decisis*

is most compelling when the challenged principle of law reflects the accumulated wisdom of a body of precedents stretching back over many years and many courts.[10] That is precisely the situation here. Under these circumstances, this Court has continued to adhere to the proposition that "the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Payne v. Tennessee*, 59 U.S.L.W. at 4823 (Souter, J., concurring), *quoting Welch v. Texas Dep't of Highways and Public Transportation*, 483 U.S. 468, 494 (1987). Petitioners have offered no persuasive reason why the doctrine of *stare decisis* should be abandoned in this case.

C. Prayers At Public Middle School Promotional Ceremonies And At Public High School Graduation Ceremonies Fail Each Prong Of The Three-Part *Lemon* Test

1. The Purpose Of Including Prayer In Public Middle And High School Promotional And Graduation Ceremonies Is To Endorse Religion

The only evidence submitted to the district court in this case was contained in the parties' Agreed Statement of Facts. (J.A.10-19, 24).[11] The Agreed Statement of Facts contains no evidence of any secular purpose for the inclusion of prayer in the promotional and gradua-

[10] For example, Chief Justice Rehnquist's opinion for the majority in *Payne* stressed that the overruled holding in *Booth v. Maryland*, 482 U.S. 496 (1987), was not "mandated" by any "prior decisions of this Court." 59 U.S.L.W. at 4816. Similarly, Justice Scalia's concurring opinion (joined by Justices O'Connor and Kennedy) described the holding in *Booth* as "a novel rule." *Id.* at 4821.

[11] Petitioners have devoted a mere six pages of their brief to a discussion of *Lemon* as applied to the facts of this case.

tion ceremonies of Providence's public schools. Moreover, this Court has often recognized the essential religious nature and manifest religious purpose of prayer. *Wallace v. Jaffree*, 472 U.S. at 72 (O'Connor, J., concurring)(contrasting the "inherently religious" nature of vocal prayer, which is "a religious exercise," to a moment of silence, which may be neither); *Stone v. Graham*, 449 U.S. at 41 (holding that the Ten Commandments is "undeniably a sacred text in the Jewish and Christian faiths"); *Abington v. Schempp*, 374 U.S. at 225 (noting that reading the Bible and recitation of the Lord's Prayer are "religious exercises"); *Engel v. Vitale*, 370 U.S. at 424-25 ("the nature of . . . prayer has always been religious").

Indeed, this Court has never found a valid secular purpose for any type of government sponsored prayer in a public school setting. Rather, in each of the foregoing cases, the Court has firmly and unequivocally rejected any alleged secular purpose for school sponsored prayer and even for school encouragement of prayer:

> The addition of "or voluntary prayer" [in the Alabama statute authorizing a period of silence in public schools] indicates that the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion.
>
> The importance of that principle does not permit us to treat this as an inconsequential case involving nothing more than a few words of symbolic speech on behalf of the political majority. For whenever the State itself speaks on a religious subject, one of the questions that we must ask is "whether the government intends to convey a message of endorsement or disapproval of religion"

> . . . . Keeping in mind, as we must, "both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded," we conclude that Section 16-1-20.1 violates the First Amendment.

Wallace v. Jaffree, 472 U.S. at 60-61 (footnotes omitted). *See also Edwards v. Aguillard*, 482 U.S. 578 (holding that the preeminent purpose of a Louisiana statute requiring "Creation Science" to be taught in conjunction with evolution was religious).[12]

Petitioners argue that their practice of including prayer in public school promotional and graduation ceremonies is to "solemnize the occasion" and to provide "recognition and acknowledgment of the role of religion in the lives of our citizens." Pet.Br. at 44 n.43. Petitioners' pretensions to a secular purpose must fail on the facts of this case. It is undisputed that more than half of Providence's middle schools and one of its five high

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[12] A number of lower courts have likewise concluded that prayer in various public school gatherings, such as football games, school assemblies, commencement exercises, pep rallies, and athletic contests serve no secular purpose. *See Jager v. Douglas County School District*, 862 F.2d 824 (11th Cir.), *cert. denied*, 109 S. Ct. 2431 (1989)(striking down invocations delivered prior to public high school football games); *Collins v. Chandler Unified School District*, 644 F.2d 759 (9th Cir.), *cert. denied*, 454 U.S. 863 (1981)(striking down opening prayers delivered by a student at voluntary school assemblies); *Graham v. Central Community School District of Decatur*, 608 F.Supp. 531 (S.D. Iowa 1985)(holding that invocations and benedictions during commencement exercises serve a Christian religious purpose); *Doe v. Aldine Independent School District*, 563 F.Supp. 883 (S.D. Texas 1982) (holding that a prayer posted over the entrance of a public school gymnasium, sung at athletic contests, pep rallies, and graduation ceremonies has no secular purpose); *Sands v. Morongo Unified School District*, 809 P.2d 809 (Cal.Sup.Ct. 1991)(striking down prayer at commencement). *But see Jones v. Clear Creek Middle School District*, 930 F.2d 416 (5th Cir. 1991)(upholding prayer at commencement).

schools have repeatedly succeeded in producing promotional and/or graduation ceremonies without the use of prayer. Apparently, the officials of those schools have fostered secular means to solemnize and dignify their ceremonies. On these facts, one can only conclude that the officials who chose to include prayer did so because they wished to encourage or endorse prayer itself. *County of Allegheny v. ACLU*, 492 U.S. at 618 ("Where the government's secular message can be conveyed by two symbols, only one of which carries a religious meaning, an observer might reasonably infer from the fact that the government has chosen to use the religious symbol that the government means to promote religious faith").

Petitioners' second asserted secular purpose -- a recognition and acknowledgment of religion -- denies the essential nature of prayer. Prayer is not passive; it is active. Prayer does not merely "recognize" and "acknowledge" religion; "[i]t is a solemn avowal of divine faith and supplication for the blessings of the Almighty." *Engel v. Vitale*, 370 U.S. at 424. If it is not permissible for government to induce and encourage public school children to meditate on the Ten Commandments, if it is not permissible for government to encourage or endorse silent prayer in the classroom, then it is assuredly not permissible for government to choose a clergy who will pray at an important public school function and to choose what kind of prayer that clergy will be allowed to deliver. "[I]t is no part of the business of government to compose . . . prayers for any group of the American people to recite." *Id.* at 425. A government that advises chosen clergy regarding the form of prayer that is acceptable to government officials is in the business of composing prayer. Can there be any doubt that a government that engages in such activities is intending to endorse not only the religion itself, but a particular type of neutered, generic religion? Can there be any doubt that a government that engages in such activities is not

maintaining the neutrality towards religion and between religious beliefs that the Establishment Clause demands? As this Court has stated, "[h]owever desirable . . . [the government's purpose] might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause." *Stone v. Graham*, 449 U.S. at 42.

2. The Effect Of Including Prayer In The Promotional And Graduation Ceremonies Of Public Middle Schools And High Schools Is To Convey A Message Of Endorsement Of Religion

Petitioners do not explain how the inclusion of prayer in the promotional and graduation ceremonies organized, supervised, and run by public school officials can do anything but convey the message that those officials endorse religion as one of the values they are responsible for inculcating. Petitioners simply state these facts: (1) the prayers are delivered and prepared by clergy, rather than by school officials; (2) the ceremony occurs only once in each student's career; (3) the prayers are brief; (4) the prayers do not take place in a classroom; (5) attendance is not mandatory; and (6) parents and friends are present. Pet.Br. at 47-48. Petitioners make no attempt to explain, however, how these facts diminish the religious message of endorsement conveyed by prayer at public school ceremonies. Indeed, they do not.

Consider, from a child's view, the importance of his or her promotional or graduation ceremony. This one day is the culmination and the reward of years of effort. This one day is his or her day to be recognized, applauded, congratulated for his or her achievements. The importance of graduation day for an eighth grade or twelfth grade student cannot be minimized. As the district court recognized:

> While the fact that graduation is a special occasion distinguishes this school day from all others, the uniqueness of the day could highlight the particular effect that the benediction and invocation may have on the students. The presence of clerics is not by itself determinative. It is the union of prayer, school, and important occasion that creates an identification of religion with a school function. The special nature of the graduation ceremonies underscores the identification that Providence public school students can make.

App.B at 24a (footnote omitted).

Consider, from a child's point of view, the planning for his or her graduation ceremony. Teachers have selected the format and the program. Teachers have chosen who will deliver speeches, who will sing, who will hand out diplomas. Teachers have decided who will open and close the ceremony and, in this case, teachers have decided that the person who will do this is a member of the clergy. Teachers "practice" the ceremonies with the children who are graduating. They tell the children how to line up, where to walk, where to sit, when to sit and stand, and generally how they should behave. Teachers, in short, are running this show.[13]

Consider, as well, the graduation ceremony itself. It is typical for the children who are being promoted or who are graduating to be seated together, for family and friends to be seated apart. When the ceremony begins, when, in this case, the clergy rises to deliver the invocation -- what will the child see? He will see school offi-

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[13] This Court has recognized the importance of "students' emulation of teachers as role models" as well as "children's susceptibility to peer pressure." *Edwards v. Aguillard*, 482 U.S. at 584.

cials and teachers standing and adopting stances appropriate to prayer. He will have been told to stand himself. Indeed, he will have no choice but to stand himself, for to adopt a stance different from the rest of his classmates and from his teachers will be to cause a disruption in the ceremony. He will hear a prayer being offered. And he will have, inescapably, the sense that teachers and school officials are endorsing and supporting the message being delivered. Moreover, in choosing the clergy, by making him or her part of this important public school ceremony, petitioners have unequivocally lent the support of government "to the communication of a religious organization's religious message." *County of Allegheny v. ACLU*, 492 U.S. at 601.[14]

Petitioners have used the machinery of government to encourage participation in a religious exercise. *Wallace v. Jaffree*, 472 U.S. at 73 n.2 (O'Connor, J., concurring). This is a violation of the Establishment Clause.[15]

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[14] It is useful to consider the differences between the manner in which graduation ceremonies are conducted and the manner in which legislative sessions are conducted -- legislators are free to, and frequently do, enter and leave the legislative chambers at will; they do so, not in a processional, but individually; legislators may enter a legislative session in the middle of the session and leave before it is over; legislators are not compelled to remain quiet during the session, but engage in discussion among themselves; legislators are adults, and have not been told how to behave by others holding a position of authority over them; the progress of a legislative session is much less controlled and more variable than a graduation ceremony.

[15] The brevity of the prayers offered and the fact that attendance at the ceremony is not required of the child are inconsequential. These issues have already been addressed and dismissed as irrelevant by this Court. *See Wallace v. Jaffree*, 472 U.S. 38; *Abington v. Schempp*, 374 U.S. at 224-25; *Engel v. Vitale*, 370 U.S. at 430, 436.

3. Petitioners' Practice Impermissibly Entangles Government With Religion

Petitioners argue that their practices avoid the pitfalls of government entanglement with religion because school officials merely distributed, but did not formulate, the "Guidelines for Civic Occasions," and because school officials do not write or monitor the officiating clergy's prayers. Pet.Br. at 44 n.43. Petitioners do not accurately state the pertinent facts. According to the parties' Agreed Statement of Facts:

> Defendant Robert E. Lee, principal of the Nathan Bishop Middle School, received, from Assistant Superintendent of Schools Arthur Zarrella, a document entitled "Guidelines for Civic Occasions" as a guideline for the type of prayer to be included in the graduation ceremony of the Nathan Bishop Middle School . . . . Defendant Robert E. Lee, provided to Rabbi Gutterman a copy of the "Guidelines for Civic Occasions" . . . and, in addition, spoke personally to Rabbi Gutterman *to advise him that prayers that he gave at the invocation and benediction should be non-sectarian in nature.*

(J.A.12-13, ¶¶14, 17)(emphasis added). The guidelines in question, published by the National Conference of Christians and Jews, include, among other suggestions, "appropriate" opening ascriptions to be used for the deity in public prayer. (J.A.21). The guidelines also suggest that public prayer should "remain faithful to the purposes of acknowledging divine presence and seeking blessing, not as opportunity to preach, argue or testify." *Id.*

Clearly, petitioners not only choose which religious sects will be represented and will be allowed to pray at

public school ceremonies, they also monitor the types of prayers that are offered and "advise" the clergy chosen as to what types of prayers are acceptable. By so doing, petitioners interfere with the way that the chosen clergy practice their respective religious beliefs. *See Larkin v. Grendel's Den*, 459 U.S. 116, 122 (1982)(state interference with the practice of religious faith violates the First Amendment). This is an impermissible entanglement of government with religion.

D. The Historical Analysis Adopted By The Court In *Marsh v. Chambers* Does Not Save Petitioners' Practice Of Including Prayer In Public School Promotional And Graduation Ceremonies From Constitutional Infirmity

Petitioners attempt to broaden the Court's analysis of the constitutionality of legislative prayer set forth in *Marsh v. Chambers*, 463 U.S. at 791, to encompass the practice of inviting clergy to deliver prayers at public school promotional and graduation ceremonies. The proposition petitioners advance is that "any interpretation of the Establishment Clause faithful to its intended meaning 'must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion.'" Pet.Br. at 30 n.31, *quoting County of Allegheny v. ACLU*, 492 U.S. at 670 (Kennedy, J., concurring in the judgment in part and dissenting in part).

This Court has squarely rejected both *Marsh*'s applicability to practices which impact on the relationship between religion and public education and blind validation of all practices arguably acceptable to the framers' generation. *See Schad v. Arizona*, ___ U.S. ___, 59 U.S.L.W. 4761, 4767 (June 21, 1991). Indeed, the *Marsh* Court itself cautioned that "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional

guarantees." *Marsh v. Chambers*, 463 U.S. at 790. Were historical acceptance alone sufficient to assure the constitutional validity of any given action, the Court would be compelled to uphold such practices as public whipping and racial segregation of schools. *Id.* at 814 n.30 (Brennan, J., dissenting). *See also Committee for Public Education v. Nyquist*, 413 U.S. at 792. Discrimination against non-Christians would also be acceptable. *County of Allegheny v. ACLU*, 492 U.S. at 604-05. Clearly, *Marsh* was not intended to produce such intolerable results.

Nor can *Marsh* be read as validating practices which bring religion into the public education system. This Court first recognized in *Schempp* that historical analyses are misplaced in constitutional inquiries relating to the public schools:

> [T]he structure of American education has greatly changed since the First Amendment was adopted. In the context of our modern emphasis upon public education available to all citizens, any views of the eighteenth century as to whether the exercises at bar are an "establishment" offer little aid to decision. Education, as the Framers knew it, was in the main confined to private schools more often than not under strictly sectarian supervision. Only gradually did control of education pass largely to public officials. It would, therefore, hardly be significant if the fact was that the nearly universal devotional exercises in the schools of the young Republic did not provoke criticism; even today religious ceremonies in church-supported private schools are constitutionally unobjectionable.

374 U.S. at 238-39 (footnote omitted). *See also Wallace v. Jaffree*, 472 U.S. at 80 (O'Connor, J, concurring)

("Since there then existed few government run schools, it is unlikely that the persons who drafted the First Amendment, and the state legislators who ratified it, anticipated the problems of interaction of church and state in the public schools"). In *Edwards v. Aguillard*, 482 U.S. at 583 n.4, this Court specifically stated that "a historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted." Finally, the *Marsh* Court itself observed that legislative prayers are primarily directed to adults, who are not as readily susceptible to "religious indoctrination" or peer pressure as children. *Marsh v. Chambers*, 463 U.S. at 792.

Thus, petitioners can produce no precedent whatsoever from this Court which supports the extension of *Marsh* to religious practices within the public schools. In fact, each time this Court has addressed the issue, it has flatly rejected petitioners' argument.

II. GOVERNMENT COERCION HAS NEVER BEEN ACCEPTED AS A NECESSARY ELEMENT OF AN ESTABLISHMENT CLAUSE VIOLATION

A. Historically, The Meaning Of The Establishment Clause Was Not Limited To A Prohibition Of Government Coercion Of Religion

Petitioner's principal argument is not that this Court has ever adopted their coercion test, but rather that nearly every modern Justice has fundamentally misunderstood the Establishment Clause. Petitioners urge the Court to throw out all its precedents and start over on the basis of petitioners' version of history.

Petitioners' history is not based on any *particular practice* of the framers with regard to public schools; public schools barely existed. Nor is petitioners' history based on any *principle* articulated by the framers. Petitioners quote the framers denouncing religious coercion, but the invalidity of religious coercion is not at issue. The dispute is over petitioners' further claim that government can aid religion if it does not coerce. Petitioners do not quote the framers saying *that*. Nor do petitioners discuss the only eighteenth century debates that would have posed the issue.

Both then and now, the essence of establishment was the designation or endorsement of a preferred religion. Indeed, the leading historical dictionary defines establishment in terms of recognition, and does not even mention coercion:

> **Establishment** 2. *esp.* The "establishing" by law (a church, religion, form of worship). (See ESTABLISH *v.* 7)
>
> **Establish** 7. From 16th c. often used with reference to ecclesiastical ceremonies or organization, and to the recognized national church or its religion.

3 *Oxford English Dictionary* 298 (1933).

This definition is fully consistent with American usage in the period of the framing. Coercion to attend the established church had been abandoned well before the Revolution. T. Curry, *The First Freedoms* 78-104 (1986). Tax support for the established church continued in the southern colonies only up to independence. *Id.* at 136 (Virginia), 150 (South Carolina), 151-52 (North Carolina), 153 (Georgia), 154-57 (Maryland). In New England, tax support continued into the early national period. But in both regions, defenders of establishment tried to save tax support by letting all denominations participate, by letting each taxpayer choose the

church or clergyman to receive his payments and, in Virginia and Maryland, by exempting some citizens entirely. *Id.* at 141, 145 (Virginia), 155-57 (Maryland), 164 (Massachusetts), 180-81 (Connecticut), 185-86 (New Hampshire), 188-89 (Vermont). These efforts to make establishment nonpreferential and noncoercive did not save it. The most important political battle over disestablishment was fought over precisely this issue in Virginia in 1785, and the nonpreferential general assessment was rejected. *Id.* at 140-47. By 1833, the last of these laws had been repealed as inconsistent with the American principle of disestablishment. L. Levy, *The Establishment Clause* 38 (1986).

As tax support and compelled attendance were abandoned, there remained the core of establishment, the endorsement of a state religion. The endorsement issue was most cleanly separated from more coercive forms of establishment in South Carolina and Virginia. The South Carolina Constitution of 1778 declared that "The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State." S.C. Const. art. 38 (1778), *reprinted in* 6 F. Thorpe, ed., *The Federal and State Constitutions* 3255 (1906).

No one was required to support this religion in any way. No citizen was required to attend services or contribute financial support. The Constitution guaranteed religious toleration and forbade tax support for churches. *Id.* at 3255-56. The established religion in South Carolina consisted of a simple declaration that the state endorsed Protestantism. That violated the contemporary understanding of disestablishment, and the provision was repealed in 1790. *See* S.C. Const. art. 8 (1790), *reprinted in* Thorpe at 3264. Petitioners' theory implies that the South Carolina Constitution of 1778 could be validly reenacted today.

In Virginia, the last vestige of establishment was a

simple act of incorporation for the Protestant Episcopal Church. The act had no coercive effect on the opponents of establishment, but they objected to it because it singled out Episcopalians for "peculiar distinctions" and "particular sanction." T. Buckley, *Church and State in Revolutionary Virginia, 1776-1787* at 165 (1977). The legislature repealed the act in 1787. *Id.* at 170.

In these two instances, Americans of the founding generation actually debated and voted on the question whether government could endorse religion if it did so noncoercively. The answer was no. These debates show how the framers understood disestablishment when they attended to the issue. The dissenting churches, focused on the task of eliminating the former Anglican establishment, insisted on eliminating mere endorsements.

Petitioners ignore this history of real debate over the meaning of disestablishment, and rely instead on a practice that was not debated: prayers and religious declarations among adults in civil ceremonies. These practices were not debated because they were not controversial among Protestants, and there were no other religious minorities with sufficient political strength to raise the issue.

This unexamined Protestant consensus broke down in the face of two developments in the nineteenth century: the emergence of public schools, and large-scale Catholic and Jewish immigration. Catholic complaints about Protestant instruction and Bible reading in the public schools led to political conflict and physical violence. 1 A. Stokes, *Church and State in the United States* 830-35 (1950). It then became clear that in a more pluralistic society, religious observances in public schools caused the same evils that tax support for churches, and endorsements of Episcopalians, had caused in the time of the framers.

The principle was the same in both generations:

government should not support or endorse religion. Such endorsements cause religious strife if they disadvantage any significant group in the community. The framers adopted the principle, and they applied it to all issues that were controversial among Protestants. They did not see its application to practices that substantially all Protestants could accept. But they put the principle in the Constitution, ready to be applied to new examples of the same evil. Protestant-Catholic and Christian-Jewish conflict revealed that government sponsored religious observances, especially among children, caused the very evils that the Establishment Clause had been intended to prevent. American understanding of the reach of the disestablishment principle has expanded with the steady increase in religious pluralism, and the constitutional tradition is reflected in this Court's decisions prohibiting religious observances in public schools.

Petitioners also rely on James Madison's comment that the Establishment Clause meant that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." Pet.Br. at 24. This comment does not help petitioners. It does not state petitioners' position, and it does not describe the version of the Establishment Clause ultimately adopted.

Madison's statement has three clauses: Congress may not (1) establish a religion, (2) enforce observation, or (3) compel worship. Petitioners rely on clauses (2) and (3) and treat them as exclusive. But clause (1) is as broad as the meaning of establishment. If to establish a religion meant to recognize or endorse a religion in the vocabulary of the late eighteenth century, then Madison said that Congress cannot recognize or endorse a religion. Whatever establishment meant, Madison repeated it; he did not define it or limit it.

Madison cannot have meant for his listeners to ignore clause (1) and consider only clauses (2) and (3).

Those two clauses alone would not even prevent tax support for churches. Congress could collect taxes for all religions or a particular religion without compelling anyone to observe that religion or to worship in a particular manner. So with clause (1) included, Madison's statement is entirely consistent with this Court's cases. With clause (1) excluded, Madison's statement is obviously incomplete, even narrower than petitioners' position.

Whatever Madison meant in this isolated comment is of little moment.[16] The House promptly rejected the draft Madison had paraphrased, and adopted Mr. Livermore's sweeping substitute: "Congress shall make no laws touching religion, or infringing the rights of conscience." 1 *Annals of Cong.* 731 (J. Gales ed. 1834). Any law referring to religion in any way would "touch" religion; adoption of the Livermore amendment is inconsistent with the claim that this discussion in the House confined the Establishment Clause to coercion.

The clause was further redrafted in the Senate and the Conference Committee. Those debates were not recorded, but votes in the Senate Journal reveal an unsuccessful attempt to narrow the clause to forbid only those establishments that preferred a particular sect, society, or denomination. Four such drafts were ultimately rejected. 3 L. de Pauw, ed., *Documentary History of the First Federal Congress of the United States of America* 151, 166, 220 (1972). The draft that was finally ratified is one of the most sweeping considered by either House. It forbids not just the establishment of religion, but any law *respecting* an establishment. It does not merely forbid es-

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[16] Indeed, Madison himself would have denied the legitimacy of considering this statement. Madison and the other framers believed that the Constitution should be construed in light of the text adopted and the evils to be eliminated, without reference to legislative history. *See* Baade, "'Original Intent' in Historical Perspective: Some Critical Glosses," 69 Tex.L.Rev. 1001 (1991); Powell, "The Original Understanding of Original Intent," 98 Harv.L.Rev. 885 (1985).

tablishment of a church or even of "a" religion; it forbids "establishment of religion" generally. *See* Laycock, "'Nonpreferential' Aid to Religion: A False Claim about Original Intent," 27 Wm. & Mary L.Rev. 875, 881-82, 886 (1986).

There is no reason to believe that this sweeping clause used "establishment" in less than the full sense accorded to the phrase by the opponents of established religion. Historical usage as reflected in the dictionary, and contemporary political debates over disestablishment in the states, both show that the word included recognition and endorsement. That is what the Establishment Clause prohibits. That is what this Court has always said the Establishment Clause prohibits. Petitioners' attempt to rewrite history ignores the most important evidence.[17]

B. This Court Has Consistently Rejected Coercion As A Necessary Element Of An Establishment Clause Violation

Not only does history fail to support petitioners' thesis that coercion is a necessary element of an Establishment Clause violation, but this Court has repeatedly rejected such a proposition, both specifically and by inference. Beginning with *Everson v. Board of Education*, 330 U.S. 1, this Court has clearly understood the Establishment Clause to reach beyond a prohibition of government coerced participation in religion:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a State nor Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force *nor influence* a person to go to or to remain away from church against his will or force him to prefer a belief or disbelief in any religion . . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.

Id. at 15-16 (emphasis added). The *Everson* Court clearly envisaged constitutional protection against noncoercive governmental involvement in religion.

In *Engel v. Vitale*, 370 U.S. at 430, the Court specifically held that "[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." This Court has consistently and unconditionally adhered to this principle whenever presented with a "coercion" argument. *See Abington v. Schempp*, 374 U.S. at 224-25 ("Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause"); *Committee for Public Education v. Nyquist*, 413 U.S. at 786 ("[W]hile proof of coercion might provide a basis for a claim under the Free Exercise Clause, it was not a necessary element of any claim under the Establishment Clause"); *Wallace v. Jaffree*, 472 U.S. at 60 n.51.

Most recently, Justice O'Connor addressed this issue in her concurrence in *County of Allegheny v. ACLU*, 492 U.S. at 627-28 (citations omitted):

> An Establishment Clause standard that prohibits only "coercive" practices or overt efforts at government proselytization . . . but

[17] A far more extensive historical analysis appears in the Brief *Amicus Curiae* of the American Jewish Committee, *et al.* Respondent fully endorses that analysis.

> fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community. Thus, this Court has never relied on coercion alone as the touchstone of Establishment Clause analysis . . . . To require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the Free Exercise Clause a redundancy . . . . Moreover, as even Justice Kennedy recognizes, any Establishment Clause test limited to "*direct* coercion" clearly would fail to account for forms of "[S]ymbolic recognition or accommodation of religious faith" that may violate the Establishment Clause.

The core of the doctrine which petitioners exhort the Court to adopt is summarized in one sentence -- "Religious speech alone cannot amount to the kind of government coercion of religious choice that implicates the Establishment Clause." Pet.Br. at 36. Petitioners openly suggest that government may participate in religious debates, may encourage religion, and may criticize religious expression. *Id.* at 37. The government need not be neutral towards religion generally or towards particular religious sects so long as it does not force or fund the practice of religion. *Id.* The breadth of government practices which would be constitutionally acceptable under petitioners' doctrine is startling -- government officials would be allowed to exhort citizens to join a favored sect; conversely, the same officials would be free to publicly condemn a disfavored sect. Government would be able to sponsor a Roman Catholic mass, an evangelical prayer meeting, or any other type of religious service the

officials in power happen to favor. Indeed, under petitioners' doctrine, joined by the Solicitor General, government would actually be allowed to sponsor a church, so long as no one was forced to join and no tax funds were used to support it. Petitioners cannot possibly invoke historical precedent in support of this argument, for the genesis of the Establishment Clause arose from the religious persecution borne of such sponsorship. *See Engel v. Vitale*, 470 U.S. at 431 ("The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs").

In interpreting the meaning of the Establishment Clause, this Court has recognized, as it must, that the religious complexion of the country today is vastly different than it was at the time the First Amendment was ratified. *Abington v. Schempp*, 374 U.S. at 240-41 (Brennan, J., concurring); *Edwards v. Aguillard*, 482 U.S. at 607 n.6 (Powell, J., concurring). While many government practices favoring Christianity may have been acceptable to the framers' generation, they are no longer acceptable if we are to honor the spirit of both the Free Exercise and the Establishment Clause. *County of Allegheny v. ACLU*, 492 U.S. at 630 (O'Connor, J., concurring). This Court has always so held. *Wallace v. Jaffree*, 472 U.S. at 52. To accept petitioners' doctrine would destroy the concept of government neutrality towards religion and would open the door for the very evils the Establishment Clause was intended to prevent.

C. Although Coercion Has Never Been Held To Be A Necessary Element Of An Establishment Clause Violation, Petitioners' Practice Is Nonetheless Coercive

Petitioners advocate an extraordinarily narrow definition of coercion. In so doing, they suggest that this Court eliminate common sense from judicial decision-making.

In case after case, the Court has acknowledged and considered the coercive effect of subtle actions of government officiais, especially when those actions impact on children within the public education system. Even Justice Stewart, who advocated an interpretation of the Establishment Clause restricted to government coercion of religious beliefs, recognized the indirect coercive pressures operating on public school children:

> [A] law which provided for religious exercises during the school day and which contained no excusal provision would obviously be unconstitutionally coercive upon those who did not wish to participate. And even under a law containing an excusal provision, if the exercises were held during the school day, and no equally desirable alternative were provided by the school authorities, the likelihood that children might be under at least some psychological compulsion to participate would be great.

Abington v. Schempp, 374 U.S. at 318 (Stewart, J., dissenting).

The subtle pressure upon children to conform to their peers and to emulate teachers has been recognized and acknowledged in every modern decision of this Court involving religion in the public schools. *See, e.g., Engel v. Vitale*, 370 U.S. at 431 ("When the power, prestige and financial support of government is placed be-

hind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain"); *Grand Rapids School District v. Ball*, 473 U.S. at 390 ("The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as a free and voluntary choice"); *Wallace v. Jaffree*, 472 U.S. at 60 n.51, 71 (O'Connor, J., concurring); *Edwards v. Aguillard*, 482 U.S. at 584 ("The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure"); *Board of Education v. Mergens*, 110 S.Ct. at 2378 (Kennedy, J., concurring)("This inquiry [with respect to coercion] must be undertaken with sensitivity to the special circumstances that exist in a secondary school where the line between voluntary and coerced participation may be difficult to draw").

The very type of subtle pressure which the Court has previously described as coercive operates in this case on children who are being promoted from middle school or are graduating from high school in the Providence school system. Because coercion was not raised as an issue before the district court, no facts were developed by either party with regard to coercion, other than the mere acknowledgement that attendance at graduation and promotional ceremonies is not mandatory for students. (J.A.18, ¶41). However, this Court need not blind itself to the realities of how promotional and graduation ceremonies are conducted, nor to the importance of those ceremonies to the children involved, nor to the coercion inherent in government proselytizing on behalf of religion. No choice is offered to a child who is offended by the inclusion of prayers in the ceremony except to forego attendance altogether. Graduation ceremonies are organized and formal affairs. The children who are to be

recognized enter and leave the room together, after family and friends have already been seated. They enter in a processional, anxiously and proudly watched by their families. In the unlikely event that the child were allowed to avoid coerced participation in prayer by leaving the room, there is overwhelming pressure not to take such obvious nonconforming action. Imagine the embarrassment and humiliation of a nonadhering child who attempts to withdraw from the room as all of his or her classmates are standing to begin an opening prayer. To deny that a child who wished to take such action is not coerced into conformity is nonsensical. As Justice O'Connor observed when discussing voluntary school prayer:

> Under all of these statutes, a student who did not share the religious beliefs expressed in the course of the exercise was left with the choice of participating, thereby compromising the nonadherent's beliefs, or withdrawing, thereby calling attention to his or her nonconformity. The decisions acknowledged the coercion implicit under the statutory schemes.

Wallace v. Jaffree, 472 U.S. at 72 (O'Connor, J., concurring)(citations omitted). Withdrawing from part of a graduation ceremony is clearly even more disruptive than withdrawing from a classroom, and there is a concomitant increase in the coercive pressure on a student not to take such action, even if it were allowed.

If the nonadhering child chooses to be present during his or her promotional or graduation ceremony and not to withdraw during periods of prayer, he or she is subject to the additional subtle coercion inherent in proselytizing. The Court found in *Stone v. Graham* that the mere posting of religious texts on a schoolroom wall may have the effect of inducing school children "to read, meditate upon, perhaps to venerate and obey, the Commandments." 449 U.S. at 42. If the mere posting of a religious text may have such an effect, how much more of an effect will be realized from group prayer, spoken out loud.

The child who objects to prayer is thus left with only one choice -- not to attend his or her promotional or graduation ceremony. No "equally desirable alternatives" are available. *Abington v. Schempp*, 374 U.S. at 318 (Stewart, J., dissenting). It is difficult to imagine how anyone could seriously argue that the child faced with such a choice is under no pressure to conform to the majority's notion of acceptable behavior. The message which the school and its teachers are delivering to the nonadhering child is clear:

> We have chosen to include in this all-important ceremony a prayer delivered by a religious person whom we have also chosen. This is your graduation; however, if your beliefs are offended by our choice of religion, you are free to miss your graduation. We will mail you a diploma.

Such a choice, delivered by teachers and government, is nothing short of cruel. It is surely not voluntary in any judicially cognizable sense, and cannot be constitutional under the First Amendment.

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,

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